

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS EUGENE MOORE,

Petitioner,

No. CIV S-02-0007 JAM DAD P

vs.

A.A. LAMARQUE, et al.,

Respondents.

ORDER

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Petitioner is a state prisoner proceeding pro se with a sixth amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On July 21, 2008, petitioner filed a motion for leave to supplement his sixth amended petition by adding "Claim No. LXXXVIII" which would be petitioner's 88th claim. (Mot. at 1.) Petitioner describes this claim as "prejudicial and unnecessary physical restraints while in trial and before the jury." (Id.) Petitioner contends that he discovered this new claim on March 4, 2008, while conducting research in the prison law library; however, the claim was not included in his sixth amended petition because petitioner had not yet exhausted state court remedies. Petitioner asserts that he acted with "due diligence" in exhausting the claim and that he should be allowed to supplement the sixth amended petition because respondents have not filed their answer.

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1 The court construes petitioner's motion as a motion requesting leave to amend his
 2 sixth amended petition. Under Rule 15(a)(2), when a party is no longer able to amend as a
 3 matter of course, the party must obtain either the court's leave or the opposing party's written
 4 consent. Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires."
 5 Id. Although the rule favors leave to amend, the court may exercise its discretion and consider
 6 "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether
 7 the party has previously amended his pleadings." Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir.
 8 1995). In addition, the court does not abuse its discretion in denying a motion to amend "where
 9 the movant presents no new facts but only new theories and provides no satisfactory explanation
 10 for his failure to fully develop his contentions originally." Id.

11 Here, petitioner is proceeding on his sixth amended petition. His original petition
 12 was filed in 2002. Based on his filing of numerous amended petitions, the court finds that
 13 petitioner has not acted in good faith and that further delays would be prejudicial to respondent.
 14 Furthermore, petitioner has not presented new facts in support of his proposed 88th claim. See
 15 Ghent v. Woodford, 279 F.3d 1121, (9th Cir. 2002) ("To obtain habeas relief, a court must first
 16 find that the defendant was physically restrained in the presence of the jury, that the shackling
 17 was seen by the jury, and that the physical restraint was not justified by state interests. . . .[and
 18 that defendant] suffered prejudice as a result.").

19 Accordingly, IT IS HEREBY ORDERED that petitioner's July 21, 2008 motion
 20 to supplement his habeas petition (Doc. No. 99), construed as a motion for leave to amend his
 21 sixth amended petition, is denied.

22 DATED: August 27, 2008.

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 25 DALE A. DROZD
 26 UNITED STATES MAGISTRATE JUDGE

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